Jochannan v City of New York
2016 NY Slip Op 32619(U)
December 12, 2016
Supreme Court, Bronx County
Docket Number: 21963-2014
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 21

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NNANDI BEN JOCHANNAN and HENRY BENAVIDES,

Index No.: 21963-2014

Plaintiffs,

-against-

Decision & Order

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, POLICE OFFICER SAL FLORES, POLICE OFFICER GEORGE HINES, POLICE OFFICER JOHN DOE and POLICE OFFICER JOHN ROE,

Defendants.

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HON. BEN BARBATO:

The following papers were considered on the defendants' motion for summary judgment:

PAPERS	**NUMBERED**
Motion to Dismiss and annexed Exhibits and Affidavits	**1**
Affirmation in Opposition and annexed Exhibits and Affidavits	**2**
Reply Affirmation	**3**

Based on the foregoing papers, the defendants' motion for summary judgment dismissing the complaint is hereby granted in part.

On September 11, 2013, plaintiff Nnandi Ben Jochannan ("Jochannan") was operating a vehicle ("subject vehicle") within the vicinity of 890 Elsmere Place, Bronx, New York. At the time, plaintiff Henry Benavides was seated in the rear passenger seat of the vehicle and a non-party, Juan Lasanta, was seated in the front passenger seat. Defendant Police Officers Sal Flores ("Officer Flores") and George Hines ("Officer Hines") allege that they observed the subject vehicle traveling at a high rate of speed, swerve between lanes and make a turn without signaling. Thereafter, the defendant police officers performed a traffic stop of the subject vehicle. The defendant police officers further contend that, when they approached the vehicle, they immediately detected the odor of marihuana emanating from the vehicle and asked all three occupants to step outside of the car. Each of the occupants was subsequently patted down and moved towards the rear of the vehicle, at which point Officer Hines searched the cabin of the subject vehicle. The defendants assert that, during the search, Officer Hines observed a firearm "in plain view" on the floor behind the driver's seat. After the firearm was recovered, all three occupants were placed under arrest and transported to the 48th Precinct, where they were strip searched and processed. Subsequently, both plaintiffs received an Adjournment in Contemplation of Dismissal ("ACD").

The plaintiffs now seek to recover damages for, inter alia, false arrest and imprisonment as well as violations of their civil and constitutional rights. The defendants seek summary judgment dismissing all of the plaintiffs' claims.

It is well established that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; CPLR 3212[b]). The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

State Claims

The question whether defendants are entitled to summary judgment as to the plaintiffs' claims arising under state law for malicious prosecution and negligent hiring, retention, training and supervision may readily be resolved. Both of the plaintiffs accepted an Adjournment in Contemplation of Dismissal ("ACD"), which precludes them from recovering on a claim for malicious prosecution as a matter of law (*Eke v City of New York*, 116 AD3d 403 [1st Dept. 2014], *Probber v Yousef*, 5 AD3d 204 [1st Dept. 2004]). Similarly, the defendants are entitled to summary judgment on the negligent hiring, retention, training and supervision claims "because it is undisputed that the officer[s were] acting within the scope of [their] employment, and plaintiff[s] do not seek punitive damages based on gross negligence in the hiring or retention of the officer[s]" (*Medina v City of New York*, 102 AD3d 101, 208 [2012]).

With respect to that aspect of the defendants' motion seeking summary judgment on the false arrest and false imprisonment claims, it is axiomatic that, to establish a cause of action for false arrest or false imprisonment, "the plaintiff must show that (1) the defendant intended to confine him or her, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged" (*Broughton v State of New York*, 37 NY2d 451, 456-457 [1975]). As is often the case, the only point of contention herein is whether the confinement was privileged. The defendants assert that they are entitled to summary judgment on the plaintiffs' claims for false arrest and false imprisonment by raising the affirmative defense of probable cause, which serves as a legal justification for the defendant police officers' conduct (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]).

Probable cause "requires a showing 'of such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe that [the subject] had committed the [crime]'" (*Jenkins v City of New York*, 2 AD3d 291 [1st Dept. 2003], *citing Smith*

v County of Nassau, 34 NY2d 18, 25 [1974]). To make such a showing, a party is not required to submit "proof sufficient to warrant conviction beyond a reasonable doubt, but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]).

In the instant matter, the court's probable cause analysis is two-fold, as it is necessary to determine both whether the defendant police officers had probable cause to make their initial traffic stop and whether they possessed the requisite cause to search the vehicle. With respect to the initial car stop, the sworn statements of Officer Hines and Officer Flores state, in sum and substance, that they observed the subject vehicle swerve in between lanes while traveling at a high rate of speed. If proven, these statements would be sufficient to support a finding that the defendant officers had probable cause to believe that the driver of the subject vehicle, plaintiff Jochannan, had violated the Vehicle and Traffic Laws ("VTL"), which would have rendered the initial detention of the vehicle permissible (*People v Edwards*, 14 NY3d 741 [2010]).[1]

However, both of the plaintiffs provided a markedly different factual recitation of the events leading to the initial car stop during their respective GML §50-h hearing testimonies. Of particular significance are their attestations that plaintiff Jochannan operated the subject vehicle at a reasonably prudent speed and employed the appropriate turn signals prior to changing lanes or directionality of the vehicle. These discrepancies raise issues of credibility, which may not be determined by a court on a motion for summary judgment (*Mendoza v Fordham-Bedford Housing Corp.*, 139 AD3d 578 [1st Dept. 2016]). Accordingly, there remains an issue of fact as to whether the defendant officers had probable cause to stop the subject vehicle.

Moreover, even if this court were to determine that, as a matter of law, there was probable cause to stop the vehicle, there would still be questions of fact regarding whether the defendant police officers had probable cause to search the subject vehicle. While a police officer may legally direct the driver and occupants of a stopped vehicle to exit the car (*People v Anderson*, 17 AD3d 166 [1st Dept. 2005]), the police officer may only conduct a subsequent search of the vehicle upon probable cause to believe that the vehicle contains contraband (*People v Langen*, 60 NY2d 170 [1st Dept. 1983]; *see United States v Ross*, 456 US 798 [1982]). It is beyond doubt that a police officer's detection of the odor of marihuana is sufficient to supply probable cause to search the inside of a vehicle (*People v Franklin*, 137 AD3d 550 [1st Dept. 2016]; *People v Robinson*, 103 AD3d 421 [1st Dept. 2013]). Although it appears that here, as with the question of the initial car stop, the plaintiffs merely rebut the allegations of the defendant officers by claiming they were never in possession of marihuana, closer review reveals several other factors that undermine the defendants' entitlement to summary judgment. The most glaring defect is the noticeable absence of any reference to the detection of the odor of marihuana – the basis for the vehicle search – in any of the police paperwork (including the memo book entries and arrest reports) or in the criminal complaints. Thus, we are again left with credibility determinations as to which factual account is true, precluding an award of summary judgment for the defendants.

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[1] Despite plaintiffs' counsel's claims, it is irrelevant that the defendant officers did not issue plaintiff Jochannan a traffic summons since he was charged with violating VTL 1212 in the criminal complaint filed against him.

Furthermore, despite counsel for the defendants' assertions to the contrary, there is no documentary evidence that conclusively establishes that the defendant police officers had probable cause to stop the vehicle and to permit their subsequent search of the vehicle. Counsel's attempt to direct this court's attention to the criminal complaint as "documentary evidence" is misguided as a criminal complaint, by its very definition, is merely an accusatory instrument. To constitute "documentary evidence," the document "must be unambiguous, authentic and undeniable" (*Granada Condominium III Ass'n v Palomino*, 78 AD3d 996, 996-97 [2d Dept. 2010]). In fact, to accept counsel's proposition would be to undermine the very foundation of our criminal justice system – which is, of course, predicated upon the notion that a person is presumed innocent until **proven** guilty. Moreover, the defendants' argument that the property vouchers and arrest reports purport to indicate that marihuana was recovered from the plaintiffs' persons is irrelevant to the question of whether there was probable cause.

Because there is an issue of fact as to whether there was probable cause to effectuate the plaintiffs' arrests, summary dismissal of their assault and battery claims is improper at this time (*Mendez v New York*, 137 A3d 468, 471-472 [1st Dept. 2016]).[2]

However, the defendants are entitled to judgment as a matter of law as to the plaintiffs' claims against the New York City Police Department because it is not an entity amenable to lawsuit pursuant to the New York City Charter, Chapter § 396 (*Jenkins v City of New York*, 478 F.3d 76 [2d Cir. 2007]).

Federal § 1983 Claims

It is axiomatic that liability may not be imputed to a local government for false arrest, malicious prosecution or malicious abuse of process under 42 USC § 1983 ("§1983 claims") unless the plaintiff demonstrates that his or her civil rights were violated as a result of an official government policy, custom or widespread practice (*Monell v New York City Dept. of Social Servs*, 436 US 658, 694 [1978]). Moreover, a plaintiff may establish that such a policy exists by submitting proof that the municipality exhibited a pervasive custom or practice indicative of a deliberate indifference to its citizens' civil or constitutional rights (*Connick v Thompson*, 563 US 51, 60-62 [2011]). The crux of this standard is that a municipality may only be held liable if the municipality itself caused the violation of the person's civil rights, not under the theory of respondeat superior or vicarious liability (*Liu v New York City Police Dept.*, 216 AD2d 67 [1st Dept. 1995]). In other words, the municipality will only be found liable for the unconstitutional conduct of its agent under circumstances evincing that the agent engaged in the proscribed behavior in furtherance of the official governmental policy or practice (*Monell*, 436 US at 690).

The complaint alleges that the three individual defendant police officers, in their capacities as agents of defendant City of New York ("City"), subjected the plaintiffs to unlawful arrests pursuant to the "Stop and Frisk" program, which has since been abandoned in practice by the New York Police Department. Referencing the findings reached by Judge Shira A. Scheindlin in *Floyd v City of New York* (813 F.Supp.2d 417 [SDNY 2011]), the plaintiffs allege that Stop and Frisk reflected a policy within the NYPD designed to meet arrest quotas while

[2] Although defendants' counsel categorizes these claims as one for excessive force, the plaintiffs' causes of action are for simple assault and battery.

targeting individuals of a certain race or ethnicity. In conjunction with Judge Scheindlin's determinations regarding the constitutionality of Stop and Frisk, the plaintiffs also furnish the court with numerous anecdotal accounts of individuals sharing similar ethnic backgrounds as the plaintiffs herein who were purportedly arrested without probable cause and in violation of those individuals' civil rights. The "proof" offered by the plaintiffs is inadequate to state a valid *Monell* claim because none of the evidence supports a finding that the constitutionally impermissible program – stop and frisk – was the impetus behind the plaintiffs' arrests (*Board of County Com'rs of Bryan County, Okl v Brown*, 50 US 397, 404 [1997]). Therefore, the defendants are entitled to summary judgment with respect to the plaintiffs' §1983 claims against defendant City.

However, the unresolved issue of probable cause precludes the defendants' right to relief as to those § 1983 causes of action, with the exception of that for malicious prosecution, as asserted against the individual defendant police officers (*Mendez, supra*). As with their claims arising under state law, because both of the plaintiffs herein accepted ACDs, they may not maintain a viable §1983 cause of action against the defendant officers for malicious prosecution.

Accordingly, the defendants' motion for summary judgment is hereby granted to the extent that the following claims are hereby dismissed: 1) the plaintiffs' claims for malicious prosecution arising under state law; 2) the plaintiffs' §1983 claims for malicious prosecution; 3) the plaintiffs' claims for negligent hiring, supervision, retention and training; 4) the plaintiffs' §1983 claims against defendant City of New York; and 5) those of the plaintiffs' claims asserted against the New York City Police Department.

The defendants are directed to serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry and file proof thereof with the clerk's office.

This constitutes the order of this court.

Dated: ~~November 4~~ December 12, 2016

ENTER:

J.S.C.